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No. 07-916

IN THE

Supreme Court of the United States

ROBERT BRACE,

Petitioner

v.

THE UNITED STATES,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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BRIEF INTRODUCTORY STATEMENT

On June 25, 1996, after losing an enforcement action brought by the Government and exhausting all avenues of appeal, Robert Brace acquiesced to the Government's demands to "restore" his property entered into a Consent Order. The terms of that Consent Order required that Brace, among other acts, place fill and structures on his property for the purpose of "restoring" that property to the condition that existed in 1984 – a point in time when Brace's property was dry. After complying with the Consent Order, Brace's previously dry property began to flood to the point where, at the time of trial, a large pond was consistently present.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in concluding that the Consent Order to which Robert Brace acquiesced could not, regardless of its effect on Brace's property, cause a Fifth Amendment taking.

2. Whether the Court of Appeals erred in concluding that the Government's forced placement of a check dam and fill on Brace's property did not constitute a physical taking.

3. Whether the Court of Appeals erred in concluding that two legally and factually distinct parcels constituted the relevant parcel for the regulatory takings analysis when, during earlier enforcement proceedings, the Government successfully argued that Brace was not entitled to consider both parcels in applying the exceptions to the Clean Water Act.

LIST OF PARTIES

Petitioner:

Robert Brace

Respondent:

United States of America

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Opinion and Order of the United States Court of Federal Claims:

Brace v. United States, 72 Fed. Cl. 337 (2006).

Opinion and Order of the United States Court of Appeals for the Federal Circuit:

Brace v. United States, 2007 WL 2947319 (C.A.Fed.)

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over the decision of the October 10, 2007 Order of the United States Court of Appeals for the Federal Circuit (the "Court of Appeals") pursuant to 28 U.S.C . § 1254(1). The Court of Appeals had jurisdiction over the August 4, 2006 final order of the United States Court of Federal Claims (the "Trial Court") pursuant to 28 U.S.C. § 1295.. The Trial Court had jurisdiction over this takings claim pursuant to 28 U.S.C. § 1491.

CONSTITUTIONAL PROVISIONS INVOLVED

"[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

CONCISE STATEMENT OF THE CASE

Robert Brace ("Brace") commenced this action in 1998 after a previous legal dispute between Brace and the United States of America (the "United States"), acting through the Environmental Protection Agency ("EPA"). The action concluded with the entry of a consent decree mandating the placement of certain materials and structures on a 58-acre farm Brace had purchased in 1975 (the "Murphy Farm").

Brace's Purchase and Use of the Murphy Farm

Prior to the 1940s, the Murphy Farm was owned by individuals unrelated to Brace's family. (Fed. Cir. App. 150[1]). During the 1940s, Brace's father purchased the farm and began using it as pastureland for his dairy cattle. (Fed. Cir. App. 153). The Brace family had been farmers in Erie County, Pennsylvania since at least the 1930s. (Fed. Cir. App. 23). Prior to his purchase of the Murphy Farm, Brace's father had owned what is referred to as the Homestead Farm. (Fed. Cir. App. 149, 152). The Homestead Farm is the farm on which Brace was raised and was used by Brace's father for crop farming. (Fed. Cir. App. 153). Brace's father owned this farm at all relevant times, both before and after his purchase of the Murphy Farm, except for a brief period during the Great Depression. (Fed. Cir. App. 149, 152). The Homestead and Murphy Farms are

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[1] "Fed. Cir. App." refers to Brace's appendix submitted to the Court of Appeals for the Federal Circuit. Brace is citing to and relying on this Appendix pursuant to Sup. Ct. R. 12(7).

legally distinct parcels, separated by a township road, that have been used by both Brace and his father for distinct farming purposes.

In 1975, Brace's parents concluded that they could no longer operate their dairy farming operation on the Murphy Farm in a sufficiently profitable manner. (Fed. Cir App. 153). As a result, they decided to sell both the Homestead and Murphy Farms. (Fed. Cir. App. 150, 153). Brace did not want the Homestead Farm to be sold outside his family. (Fed. Cir. App. 153). While dairy farming on the Murphy Farm and crop farming on the Homestead Farm was not profitable, Brace believed he could make the Murphy Farm profitable if he used it for row crops. (Fed. Cir. App. 159). With these as his personal and business goals, Brace purchased the Murphy and Homestead Farms from his parents for a total price of $170,000. (Fed. Cir. App. 150, 153, 176-177). This was the value at which Brace's parents had the two farms appraised. (Fed. Cir. App. 153-154).

Brace's Operation of the Murphy Farm and the Government's Assistance in Constructing Necessary Drainage on the Farm.

Shortly after purchasing the Murphy Farm, Brace began the process of converting the farm from pastureland to land appropriate for growing row crops. (Fed. Cir. App. 159). Like almost every other farmer in Erie County, Brace had to construct a drainage system on the Murphy Farm in order to use it for row crop farming. (Fed. Cir. App. 101). At the time Brace purchased the farm, he was aware that a more substantial drainage system would be required

to make the farm productive. (Fed. Cir. App. 157-160).

Brace was also aware that his father had begun the process of utilizing government assistance in constructing a drainage system on the Murphy Farm. (Fed. Cir. App. 23, 798-820). In or around 1961, the Agricultural Stabilization and Conservation Service ("ASCS") and the Soil Conservation Service ("SCS"), both agencies within the United States Department of Agriculture, developed a drainage plan that involved the placement of underground drainage tile on the Murphy Farm and surrounding land. (Fed. Cir. App. 105-107, 787-797). Brace's father had begun implementing this plan, and Brace continued it after purchasing the Murphy Farm. (Id.; Fed. Cir. App. 23) Working with his local ASCS office and the SCS, Brace continued the construction of the drainage system developed by the ASCS and SCS in order to convert the Murphy Farm into an "effective and productive farming business." (Fed. Cir. App. 23). Between 1977 and 1984, Brace engaged in four separate projects to provide drainage to the Murphy Farm. (Fed. Cir. App. 787-820; 106-109, 119-124, 163-164). Each of these projects was either initiated by or done in coordination with the ASCS and SCS. (Id.) All tolled, Brace laid over 11,000 feet of pipe, tile and waterways. (Id.)

Murphy Farm's Condition by 1979

By 1979, Brace's work on the drainage system resulted in the Murphy Farm being dry, except for times of excessive rainfall. (Fed. Cir. App. 23-24). By 1986, Brace's drainage work was complete and he

began growing crops on the Murphy Farm. (Fed. Cir. App. 24). The drainage system that led to this condition on the Murphy Farm was installed by Brace in concert with and with assistance from the ASCS and SCS. (Fed. Cir. App. 787-820). Brace received thousands of dollars of financial assistance from these agencies to lay the necessary underground tile and worked with both agencies, specifically the technically sophisticated SCS, in designing and constructing the drainage system to achieve the dry condition that was present on the Murphy Farm in 1979. (Id.) At trial, the former head of the ASCS's Erie office, Joseph Burawa, testified that he personally worked with Brace on this drainage project. (Fed. Cir. App. 106-108). He also testified that these types of drainage systems were common in Erie County. (Fed. Cir. App. 101). The ASCS's program that provided financial and technical assistance to farms to plan and construct such systems was, according to Burawa, the ASCS's most popular program in the 1970s and 1980s. (Id.)

The EPA's Notice of Violations

Between 1987 and 1988, the EPA issued three administrative orders and an administrative complaint (collectively, the "1988 Administrative Complaint") in which it notified Brace of its position that his activities associated with constructing and using the drainage system on the Murphy Farm violated the Clean Water Act. (Fed. Cir. App. 24). At trial, Brace offered unrebutted testimony that this was the first notice he received that his farming of the Murphy Farm and the drainage system he installed with the assistance and guidance of the

ASCS and SCS might violate the CWA. (Fed. Cir. App. 164-165).

In fact, between 1975 and 1987, the applicability of the CWA to drainage systems installed on farms was far from clear. The ASCS and SCS took the position, until 1984, that the construction and operation of drainage systems, like the system installed on the Murphy Farm, did not violate the CWA. (Fed. Cir. App. 76-77). In addition to Burawa's testimony on this point, this fact is also established by the ASCS's request, in 1984, that Brace conduct maintenance on a portion of the drainage system located on the Murphy Farm. (Fed. Cir. App. 124, 275, 307-308, and 817-820.

The Enforcement Action

In 1990, the United States filed suit against Brace in an attempt to assess civil penalties against him and force him to "restore" the wetlands on the Murphy Farm that it believed had been adversely affected by his drainage system (the "Enforcement Action"). (Fed. Cir. App. 888-892). Brace successfully defended that action before the United States District Court for the Western District of Pennsylvania. (App. 82[2]). However, that court's decision was reversed by the United States Court of Appeals for the Third Circuit (the "Third Circuit"), which found that certain exceptions to the Clean Water Act's ("CWA's") regulations did not apply and, therefore, Brace's maintenance and operation of the

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[2] "App." refers to Brace's Appendix submitted with this Petition.

drainage system in 1987 and 1988 constituted a violation of the CWA. (App. 108). Specifically, the Third Circuit held that, in determining whether Brace's drainage activities between 1985 and 1987 qualified under the CWA's normal farming operations exemption, the only area that could be considered was the 30-acre regulated site. Therefore, the Third Circuit would not consider the on-going farming activities that occurred on the Homestead Farm and the upland portions of the Murphy Farm in applying the "established farming operation" exemption. (App. 94-97). The Third Circuit remanded this case to the district court to

> enter judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders. address the remedial measures necessary to correct the violation.
>
> (App. 108).

The United States Supreme Court denied Brace's petition for a writ of certiorari.

The Consent Decree

On remand, the EPA provided Brace with a proposed consent decree (the "Consent Decree") that would resolve the Enforcement Action. Realizing that the Third Circuit's opinion would require him to engage in significant remedial measures regarding

the Murphy Farm and subject him to the possibility of substantial civil penalties, on June 25, 1996, Brace acquiesced to the terms submitted by the EPA and the United States District Court for the Western District of Pennsylvania entered the Consent Decree as an order of court. (Fed. Cir. App. 168). Under the terms of the Consent Decree, Brace was required to engage in the following relevant actions:

1. refrain from "discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site [on the Murphy Farm] . . ., unless such discharge is in compliance with the CWA;

2. "perform restoration in accordance with the wetlands restoration plan"

3. "record this Consent Decree in the applicable land records office."

(Fed. Cir. App. 893-900).

The Consent Decree was expressly designed to restore the Murphy Farm to the condition that existed in 1984. (Fed. Cir. App. 616). The facts are clear and unrebutted that, beginning in 1979 and continuing through the execution of the Consent Decree, a period of time that includes 1984, the Murphy Farm was consistently dry, except for periods of excessive rainfall.

In order to comply with the Consent Decree, Brace proceeded to remove miles of tile and disassemble the drainage system that he, in coordination with the ASCS and SCS, had

constructed over a period of twenty years. (Fed. Cir. App. 168-169). Removal of this drainage system resulted in the Murphy Farm becoming unsuitable for farming. (Fed. Cir. App. 121, 291-296). The "restoration" actions that Brace was required to undertake included the construction of a "check dam" on the Murphy Farm. (Fed. Cir. App. 893-900). The check dam, together with the removal of literally miles of drainage tile and waterways, resulted in regular flooding of the Murphy Farm, a condition that had not occurred since at least 1979. (Fed. Cir. App. 171, 291-293). By the time the Trial Court conducted a view of the property, the ""the water table on [Brace's] property ha[d] risen, indeed, so much, as to create a large pond on the lower half of the property." (App. 17).

Further, the "upland" portions of the Murphy Farm that were not part of the 30-acre site referred to in the Consent Decree were rendered unusable by the Decree. Brace is not permitted to engage in any action that would cause the discharge of any pollutant, including fill, into the wetlands on the Murphy Farm. The unrebutted testimony at trial established that once the drainage system was removed, the upland portions of the farm became highly errodible. (Fed. Cir. App. 301-302). As a result, Brace cannot farm these areas without exposing himself to substantial risk that, either through erosion or other migration of soils or water, pollutants associated with raising farm crops could enter the 30-acre site. (Id.; Fed. Cir. App. 529-532, 543-547, 596, 636, 730-731). If that were to occur, Brace would be subject to possible injunctive action

and civil penalties and contempt under the Consent Decree. (Fed. Cir. App. 893-900).

ARGUMENT

A. The Consent Decree was the Result of Required Acquiescence and, Therefore, can Support a Taking.

The Trial Court and Court of Appeals[3] failed to properly apply this Court's previous holdings regarding the type of government conduct that can result in a taking. The misapplication of this law led those Lower Courts to conclude that that the Consent Decree, by its very nature and regardless of the effect it had on Brace's property, could not cause a compensable taking.

This Court has clearly held that the touchstone of whether a given action or requirement can constitute a taking is whether that action was the result of "required acquiescence." FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987). "This element of required acquiescence is at the heart of the concept of occupation." Id. Based on this straight-forward rule, this Court has held that a state law requiring landowners to permit cable television companies to install cable television equipment on their property constitutes a taking Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982). However, a taking has not

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[3]Because the Court of Appeals affirmed the Trial Court's judgment based on the Trial Court's opinion, both the Trial Court and Court of Appeals will be referred to as the "Lower Courts", when referring to their analysis and reasoning and the substance of the opinion upon which both of their decisions was based.

occurred when a landowner invites a commercial tenant to rent space on the landowner's property and, by extending this invitation, subjects itself to federal statutes that regulated the rent the landowner can charge. Florida Power Corp., 480 U.S. at 252-53. It is this distinction between the invited commercial tenant and the "interloper with a government license" that exemplifies the required acquiescence standard. Id.

Brace did not choose to engage in any action that subjected him to heightened government regulation -- the CWA applies to the Murphy Farm regardless of the use to which Brace puts that farm. Further, Brace did not invite the EPA to place fill and structures on his property. Instead, the EPA took the position that, as applied to Brace's property, the CWA required Brace to take certain remedial actions to comply with the CWA. Based on this position, the EPA issued the 1988 Administrative Complaint and sought to require Brace to change the physical layout of his property, remove drainage tile, add fill and install a check dam. Brace disagreed with the EPA's legal position and resisted its attempt to force him to engage in this conduct on his property.

As a result of Brace's resistance, the EPA began the Enforcement Action in an attempt to force Brace to comply with its demands. Brace mounted a vigorous defense to this action; won at the trial level; lost before the Third Circuit; and was denied review by this Court. At that procedural stage, Brace was left to face a remand to the district court for the sole purpose of determining the appropriate penalties – the Third Circuit had concluded that he violated the

CWA and had directed the district court to enter judgment in favor of the United States. (App. 108). Thus, Brace had lost this legal battle, with no avenues for review. At this point, and only at this point, did Brace acquiesce to the EPA's remedial demands and agreed to engage in the "restoration" activities the EPA presented.

While paying lip service to the required acquiescence standard applied by this Court, the Lower Courts concluded that "it would be hard to fathom how a consent decree could meet the requirements for a taking." (App. 58). The Lower Courts did not rely on the specific facts of this case, nor did they properly consider the compulsion that Brace faced after losing before the Third Circuit and having no avenue of appeal or reconsideration. Instead, the Lower Court's simply concluded that, because consent orders are, by definition, part agreement, they are too voluntary to constitute a taking.

This holding is not a proper application of concept of required acquiescence. This can be seen by assuming that Brace had not resisted the EPA's enforcement efforts but, instead, immediately acquiesced in the restoration efforts they requested. Had that occurred, no enforcement action would have been filed and no consent decree would exist. In such a situation, Brace would have engaged in the restoration actions proposed by the EPA and had been left with his property in the precise situation in which it exists today.

Factually, this hypothetical circumstance would be indistinguishable to the facts addressed by

this Court in Loretto. In Loretto, the property owner did not resist the placement of cable television equipment on her building and, instead, brought suit seeking damages and injunctive relief based on that physical occupation. Loretto, 458 U.S. at 424. In Loretto, this Court concluded that the placement of the cable television equipment on the plaintiff's property pursuant to statutory authority was the result of required acquiescence and could constitute a taking. Applying this precedent to Brace's situation leads to the unavoidable conclusion that had he simply acquiesced prior to the Enforcement Action a taking would have occurred. Like the plaintiff in Loretto, Brace was required to place physical structures (i.e. the check dam and fill) on his property pursuant to statutory authority (i.e. the CWA).

Thus, it is only because of Brace's resistance to the EPA's attempt to force a physical intrusion on this property that the Consent Decree came into existence. The Lower Courts' concluded that this resistance on Brace's part, and the subsequent Consent Decree, made the physical intrusion voluntary. This conclusion results in Brace being deprived of his just compensation because he resisted the Government's intrusion on his property; a result that turns the required acquiescence standard on its head. Brace, far more that the plaintiff in Loretto was "required" to engage in the actions he took. He was required by the EPA and, eventually, by the Third Circuit through its direction to the district court to enter judgment in favor of the EPA. Brace, unlike many property owners, fought the Governments attempt to take his property. The

Lower Courts' conclusion that, through this fight Brace lost his Fifth Amendment right to just compensation is antithical to this Court's precedent.

While this Court has never addressed the issue of whether a consent order can cause a compensable taking, at least one district court case has properly applied the required acquiescence standard to this type of situation. In Scogin v. United States, 33 Fed.Cl. 568, 570-71 (Fed. Cl. 1995), the EPA sought access to the plaintiff's land under the authority granted by CERCLA. Between 1988 and August 1990, the plaintiff entered into multiple agreements with the EPA to allow the EPA access to his land to conduct certain monitoring and other activities on his property. Id. After August 1990, however, the plaintiff was unwilling to allow the EPA any additional access to his property. Id. Consequently, on June 18, 1991, the EPA issued an administrative order requiring the plaintiff to grant the EPA access to his property. Id. at 571. The plaintiff did not comply with this order and, instead, sought to fight it in court. Id. The EPA then filed an enforcement action and, on December 17, 1992, the district court ordered the plaintiff to allow the EPA access to his property or face civil penalties (the "1992 Access Order"). Id. at 572. After the district court issued this order, the plaintiff entered into a lease with the EPA's primary contractor under which the plaintiff agreed to allow the contractor access to his property in exchange for a rental payment of $2,000 per month. Id. at 573-74. The plaintiff then sued the Government, arguing, in part, that the EPA's access of his property after the 1992 Access Order constituted a taking. Id. at 574.

Taking a position identical to its argument in this case, the Government in Scogin argued,

> [T]hat plaintiff was not obligated by the district court's access order to enter into a lease agreement with a government contractor. According to defendant, having chosen to enter into the lease, and having negotiated the terms of the lease, including the compensation to be paid, plaintiff cannot now be heard complaining that the Government has worked a taking by physically occupying his land.
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> Id. at 579.

The claims court did not agree, finding that consideration of the 1992 Access Order was essential to properly understanding the effect of the post-1992 Access Order lease. "Although plaintiff's decision to enter into the lease was voluntary, the lease does not represent plaintiff's consent to the use and occupation of his property, because the access order already had deprived plaintiff of the power to consent." Id. Proceeding in this analysis in a manner directly on point with the present case, the court stated, "A material distinction exists between a consent form freely entered into and a lease agreement entered into that contemplates activities on plaintiff's property which, *but for the district court's access order, plaintiff would not have allowed*." Id. (emphasis added). The Court concluded that, consistent with Supreme Court precedent, required acquiescence was the key to determining whether an agreement could form the

basis of a taking. Based on the 1992 Access Order, the court held, "In this case the district court order authorized a mandatory physical occupation of plaintiff's property. Government compulsion was present." Id.

The facts of Scogin are indistinguishable from the facts in the present case. Like the plaintiff in Scogin, Brace attempted to resist the EPA's efforts to physically occupy his property. Like the plaintiff in Scogin, Brace failed in this effort and was then subject to a court order finding that EPA occupation was required. To address this order, Brace took the same approach the plaintiff in Scogin took – he struck the best deal he could under the circumstances. For Brace, that deal took the form of the Consent Decree. It is beyond dispute that, but for the Third Circuit's decision, Brace would not have allowed the EPA to force the several "restoration" activities mandated by the Consent Decree. As in Scogin, government compulsion was present and led directly to the Consent Decree. Because of this, the Consent Decree was the result of required acquiescence.

It is necessary that this Court correct the Lower Courts' incorrect application of this Court's prior precedent regarding required acquiescence. Allowing that precedent to remain will deprive those individuals who choose to resist government intrusions on their property, only to lose in those efforts, of their constitutional right to just compensation for the takings that result.

B. The Lower Courts' Decision Conflicts with this Court's Precedent in Finding that the Government's Physical Occupation of Brace's Property did not Constitute a Compensable Taking.

The Government's physical occupation of the Murphy Farm constitutes a taking for which just compensation is due under the Fifth Amendment. Specifically, under the authority of the CWA, the Government required that Brace: (1) install a "check dam" to cause the land to flood; (2) place substantial amounts of fill in existing or created ditches; and (3) execute and record an instrument binding all future owners to maintain the physical intrusion required by the Consent Decree. (Fed. Cir. App. 893-900)

The unambiguous language of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. When the Government, exercising its supreme power of eminent domain, physically takes land, the Constitution guarantees payment of just compensation for the land taken. Brown v. Legal Found. of Washington, 538 U.S. 216, 233-34 (2003).

In Loretto, this Court addressed a case where government action required the owner of a private apartment building to allow the installation of cable television cables and boxes on the roof of his building. 458 U.S. at 426. The Court held this permanent, physical occupation of a portion of the plaintiff's roof constituted a physical taking. Id. at 438. Regardless of the reasons for placement, or the degree to which placement interfered with the

plaintiff's use of his property, the act of permanently affixing an object to the plaintiff's roof "took" the rights he previously had in his property to "possess, use and dispose of it." Id. at 435. This Court explained:

> [t]o the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property . . . Finally, even though the owner may retain bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.
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> Id. at 435-36.

The Court concluded that the placement of the cable television cables and boxes on the plaintiff's roof destroyed each of these property rights and, therefore, constituted a physical taking. Id. at 438.

Relying on this Court's clear precedent, other courts have similarly held that any permanent, physical occupation on land constitutes a physical taking. "It is well established that the government may not take an easement without just compensation." Ridgeline, Inc. v. United States, 346 F.3d at 1352 (2003). See also Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("even if the Government physically invades only an easement in property, it must nonetheless pay just compensation"). In Hendler v. United States, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991), property owners brought action against the EPA alleging that EPA's entry onto their land, installation of groundwater wells and monitoring activities were a "taking" of property under the Fifth Amendment. Hendler, 952 F.2d at 1374-75. The Federal Circuit overruled the denial of the plaintiffs' motion for summary judgment on the issue of a physical taking. The court held that the EPA's installation of monitoring wells constituted a physical taking stating, "There is nothing temporary about the wells the Government installed on the plaintiff's property... these surveillance wells are at least as 'permanent' in this sense as the CATV equipment in Loretto, which comprised only a few cables attached by screws and nails and a box attached by bolts." Id. (citing Loretto, 458 U.S. 419 (1982)). In reaching this conclusion, the court "emphasize[d] that **the issue is not whether the Government had the right to impose itself** and its activities on the plaintiffs" and stated "[a] physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and **that is true without regard to whether the action achieves an**

important public benefit or has only a minimal economic impact on the owner." Id. (emphasis added).

1. Brace has Suffered a Physical Taking Identical to the Takings in Loretto and Hendler I and the Lower Courts' Decision to the Contrary Conflicts with These Decisions

By means of the Consent Decree, the Government ordered Brace to excavate trenches, destroy drainage tile, fill two drainage ditches and install a check dam. These actions resulted in the creation of a pond on the Murphy Farm. This pond had never before existed on the property. This action constitutes a classic physical invasion of property that is legally indistinguishable from the physical invasions of the plaintiffs' properties in Hendler I and Loretto. In Hendler I, the Government physically took the plaintiff's property by installing wells on the property. In Loretto, the Government's physical invasion sufficient to constitute a taking was the placement of cable television boxes and cables on the roof of an apartment complex. In both cases, and clearly identified in Loretto, the Courts looked to whether the Government's action (1) prevented the plaintiff from physically occupying portions of his property, or barred others from occupying those portions; (2) denied the plaintiff the authority to control the occupied space; and (3) essentially eviscerated the plaintiff's ability to dispose of or sell his property to another without the burden of the government's forced occupancy.

Here, the Government required Brace to place substantial amounts of fill in existing and newly created ditches, and to install a check dam in "unnamed Tributary A." The Government required these actions to change the hydrologic regime of the 30-acre wetlands site on the property. These actions created a pond on the property. These changes were not temporary in nature. They were required to be completed with the utmost urgency (within 90 days if possible) and to remain indefinitely. (Fed. Cir. App. 893-900). These requirements, in and of themselves, constituted a physical taking for which Brace is entitled to just compensation. They (1) deprived him of occupancy of the entire 30-acre parcel and, at a minimum, of the former ditches that the Government required Brace to fill with soil and the area upon which the Government required Brace to construct the check dam; (2) denied Brace the authority to control these areas; and (3) placed a permanent, and recorded cloud over Brace's ownership of the Murphy Farm by requiring any future owner of that property to maintain these physical intrusions.

These several physical invasions also resulted in another physical occupation -- the permanent invasion of the Murphy Farm by both ground and surface water. (Fed. Cir. App. 170, 392-94). The express purpose of the Consent Decree is to "restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek." (Fed. Cir. App. 899). To do this, the Government required not only the removal of a drainage system that took a decade to construct and incorporated miles of various drainage mechanisms, it also required the installation of a check dam. The

check dam was not something that existed on the Murphy Farm prior to Brace's purchase. It was a physical structure measuring 1 ½ feet high, 4 feet long and equal in width to the "tributary bottom." Its purpose was to trap water on the Murphy Farm that otherwise would flow over the Murphy Farm and into Elk Creek. (Fed. Cir. App. 899-900).

The Lower Courts concluded that these various physical invasions did not constitute physical takings but, rather, were subject only to analysis as potential regulatory takings. While the Consent Decree also constitutes a regulatory taking, the Lower Courts' conclusion on this point is incorrect for at least two reasons. First, Loretto and Hendler I make no mention of whether a physical occupation was caused by the enforcement of a regulation or some other government action. Instead, those cases clearly establish that any permanent physical occupation by the Government of private property is a taking. Loretto, 458 U.S. at 435-36. This is such a case, with the Government forcing Brace to place physical structures and material on his property and keep them there indefinitely.

Second, the Government is not simply regulating how Brace may use his property. Through the Consent Decree, the Government has ordered Brace to install physical structures previously not present on the Murphy Farm and, in so doing, to create a pond that previously did not exist. This portion of the Consent Decree is not a regulation of use, it is a mandatory command to place tangible objects on Brace's property for the benefit of the public as a whole. This is a paradigmatic physical taking. The fact that it was

ordered by the EPA and affected farm land does not undermine its physical nature.

The Lower Courts' discussion of the "non-sequiter" of treating the denial of a permit and restoration requirements differently is an incorrect analysis under Loretto and an incorrect application of the CWA as it relates to this case. As to Loretto, it does not include any element addressing why the physical occupation occurred. The Federal Circuit has been clear in its position that such issues are irrelevant when analyzing a physical taking. "A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and **that is true without regard to whether the action achieves an important public benefit** or has only a minimal economic impact on the owner." Hendler, 952 F.2d 1374-75 (emphasis added). Thus, the Lower Courts' analysis on this point is simply not relevant to the question of whether the Government's action constituted a physical taking.

Further, the Lower Courts' argument flows from a misapplication of the CWA and a lack of regard for what the Government achieved under the Consent Decree. Between 1975 and 1984, when Brace installed the drainage system at issue, the CWA did not require that Brace seek any permits. (Fed. Cir. App. 76-77). In fact, the ASCS and SCS assisted Brace in constructing and paying for the drainage system. The ASCS and SCS never intimated or believed that Brace required any permit under the CWA to engage in this activity. Thus, for the Lower Courts to analyze Brace's situation as a permitting case is simply not accurate. Further, the

Consent Decree did not "restore" the property to its condition in 1984, as an EPA representative testified was the intent of the Consent Decree. It did not restore the property in any way. The Consent Decree mandated the placement of fill and structures on the Murphy Farm that were never before seen and certainly not present in 1984. These mandated actions resulted in the creation of a pond that, based on the unrebutted evidence at trial, did not previously exist on the Murphy Farm.

Like the wells in Hendler I and the CATV equipment in Loretto, the check dam and fill material used to plug surface ditches constituted physical takings, and the flooding these changes created also resulted in an additional, permanent invasion that constitutes a physical taking. As this Court has made clear, even a minor physical alteration of property constitutes a physical invasion sufficient to give rise to a claim for just compensation. See Loretto, 458 U.S. at 435. The Lower Courts' decision conflicts with this well-established legal principle and with Hendler I. Based on these conflicts, which are premised on the Lower Courts' misapplication of this Court's physical takings analysis, this Court should exercise its discretion to review this case.

C. The Court of Appeals' Decision did not Follow this Court's Precedent in Defining the Relevant Parcel for the Regulatory Takings Analysis.

The linchpin in each of the Government's categorical and regulatory takings arguments at trial, and the foundation upon which the Lower

Courts' analysis on these points is built, is the definition of the "parcel as a whole." This analysis, however, engages in the precise type of manipulation that the "parcel as a whole" inquiry is designed to prevent. This case presents a striking example of the relevant parcel question being manipulated by the Government to, in the first instance, be able to take the property interest it sought and then, after achieving this taking, avoid having to pay just compensation for that interest.

The concept of a "parcel as a whole" in takings cases developed to address attempts to circumscribe total parcels of property to make their "relevant" portions co-terminus with the reach of the government regulation. This so-called "denominator" question was intended to prevent an artificial alteration in the size of the parcel at issue to serve either side in litigation. See e.g., Walcek v. United States, 49 Fed. Cl. 248, 259 (2001).

While clear that the parcel as a whole question is designed to avoid artificially defining the relevant parcel in takings cases, this Court's precedent has been inconsistent on the application of that test to different factual situations. For instance, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922), this Court struck down a statute because it made it "commercially impracticable to mine certain coal." The Court did not look to whether other coal on the plaintiff's property could be mined. Instead, it focused on the coal that was affected by the regulation and found that regulation to violate the Takings Clause because it had the same effect of "appropriating or destroying" the affected coal. Sixty-five years later, this Court faced a similar

question in Keystone Bitumimous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-97 (1987). There, the Court had to determine whether a regulation affecting the plaintiff's ability to mine coal constituted a taking. Despite relying on Mahon, and specifically reaffirming that decision, the Court looked to other coal on the property that remained available to mine and found that sufficient economic value remained to avoid a regulatory taking. Id. at 497-98.

While these decisions have left this important law unsettled, later Supreme Court cases have provided additional support for the approach taken in Mahon. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1993), the Court indicated that the proper focus in defining the relevant parcel is to look at "to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."

The principal case from this Federal Circuit has also supported defining the relevant parcel based on the portion of land that has been regulated. In Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994), this Court had to determine what portion of a developer's holdings were the relevant parcel. The developer had originally purchased 250 acres of property. In 1982, it sold 199 acres, and continued to own 51 acres. On May 5, 1982, the Army Corps of Engineers denied the plaintiff's request for a fill permit under the CWA, which the developer needed to develop 12.5 of their remaining 51 acres. Addressing the

denominator question, the Court held that the 12.5 acres of affected land constituted the relevant parcel. See also Palm Beach Isle Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

The holdings in these cases, defining the relevant parcel as the regulated land, are consistent with Mahon and represent the most reasonable and equitable approach to the denominator problem. By defining the relevant parcel as that land which has been regulated, the Court avoids any manipulation by the government or the claimant in an attempt to change the "denominator" to affect the overall economic impact of the regulation. Further, the result of this analysis focuses on what has been taken from the claimants. This is particularly true in this case.

The question of what is the relevant parcel in this case was a key question in both the Enforcement Action and this present suit. In the Enforcement Action, Brace argued, and the district court accepted, that his actions on the Murphy Farm were exempt from regulation under the CWA because they were part of an "established (i.e. on-going) farming operation." 33 C.F.R. § 323.4(a)(1)(ii). However, on appeal, the Third Circuit disagreed with this conclusion and found that Brace's activities on the Murphy Farm did not qualify for this exemption. Importantly, in analyzing this point, the Third Circuit held that the district court misinterpreted the meaning of the "established farming operation" requirement because it examined the relationship of the site in question to the rest of the land owned by Brace, including other land on the Murphy Farm and the Homestead Farm, in determining whether land

was being brought into farming use. The Court stated:

> We cannot agree with this interpretation of the statute's requirement. The regulations provide that, 'activities which bring an area into farming . . . use are not part of an established operation.' The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the "area" being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an 'established farming operation' at the site. A proper 'contextual review of its total activities' only requires us to analyze whether such activities are 'established and continuing' on the thirty-acre wetland site itself.

United States v. Brace, 41 F.3d 117 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (internal citations omitted) (App. 96). By taking this position, the Government and Third Circuit did not allow Brace to reap the benefits of including the other acreage on the Murphy Farm or the Homestead Farm in this analysis.

In this action, however, the Government has thus far successfully argued that both the Murphy and Homestead Farms must be included as the relevant parcel. This argument is a perfect illustration of the gaming of the relevant parcel analysis that can occur when it is defined as

anything other than the regulated parcel. While Brace was not able to consider his activities on the Homestead Farm or upland portions of the Murphy Farm for purposes of determining whether he qualified for an exemption under the CWA, he has been required to included the economic benefit of those activities, and the land on which they are performed, to determine whether the Government's conduct constitutes a regulatory or categorical taking. This analysis is nothing more than a "bait and switch" game being engaged in by the Government to avoid its constitutional obligation to pay Brace just compensation for the property interest it has taken. By allowing the Government to successfully engage in this gaming of the analysis, the Lower Courts have misapplied this Court's precedent, violated precedent from the court of appeals for the federal circuit, and exploited the ability to manipulate the multi-factored approach this Court has taken to this question. This Court should grant review of this case to correct this result in this case, properly define the relevant parcel as the 30 acre regulated parcel, and announce a bright line test defining the relevant parcel for takings analysis as a the parcel being regulated.

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